IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.3003 OF 2005

Shri. Shivaji Sambhaji Karche ...Applicant

Vs.

The State of Maharashtra ...Respondent

Mr. M. S. Mohite for the Applicant.
Mr. A. S. Gadkari, A.P.P. for the Respondent.

CORAM : A.S.OKA, J.

DATE ON WHICH
JUDGMENT IS RESERVED : JULY 07, 2005.

DATE ON WHICH
JUDGMENT IS PRONOUNCED: JULY 25, 2005.

P.C.:

1. By this Application filed under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the said Code of 1973'), exception has been taken to the order dated 13th April, 2005 passed by the Additional Sessions Judge, Malshiras. By the said Judgment and Order, the Application made by the Applicant under section 389(1) of the said Code of 1973 was rejected. The prayer in the said Application was for suspension of order of conviction passed against the Applicant.

2. The order of conviction passed against the Applicant is by the learned Judicial Magistrate, First Class, Malshiras. The Applicant and other three accused were convicted under section 432 read with section 34 of the Indian Penal Code. The Applicant and other accused were also convicted under section 427 read with section 34 of the Indian Penal Code. An

Application under section 389(1) of the said Code of 1973 was initially made in the Appeal preferred by the Applicant and other accused on which an order was passed on 7th January, 2005 by which a substantive sentence of imprisonment was suspended until the decision of the Appeal on condition of the Accused furnishing bail as stated in the said order. One more Application under section 389(1) of the said Code of 1973 was made at Exhibit 15 on 6th April, 2005 by pointing out that on the basis of the order of conviction, the Applicant has been removed from Government Service. Therefore, a prayer was made for suspension of conviction. By the impugned Judgment and Order, the learned Additional Sessions Judge held that under section 389(1) of the said Code of 1973, the order of conviction cannot be suspended.

3. The learned Counsel appearing for the Applicant invited my attention to various decisions of the Apex Court and submitted that there is a power vesting in the Sessions Court to suspend the conviction during the pendency of the Appeal. He submitted that the allegations of the prosecution against the Applicant are trifle in nature and all that is held against the Applicant is that certain trees belonging to the complainant fell down while an embankment was destroyed by the accused including the Applicant. The case of the Applicant and other accused was that the trees in question did not belong

to the complainant as 7/12 extract showing the entry of trees was not produced. He pointed out that the learned Magistrate held that the trees were belonging to the complainant as the Applicant and other accused did not produce the 7/12 extract showing that the said trees were owned by the Applicant and other accused. He pointed out that only offence proved against the Applicant is that they have intentionally caused mischief and damage to the complainant by obstructing the drainage and by causing inundation of water in the agricultural land of the complainant. He submitted that the dispute appears to be essentially a boundary dispute between the complainant and the accused. He pointed out that as a result of conviction, the Applicant has lost his livelihood as he has been removed from the service. He has placed reliance on the decisions of the Apex Court to which I will be referring to at later stage. The learned A.P.P. supported the impugned Judgment and Order by submitting that under section 389(1) of the said Code of 1973, the Court has no power to pass order of suspension of conviction and the power is confined to suspending the operation order of sentence.

4. I have considered the rival submissions. It is necessary to refer to a decision of the Supreme Court reported in **(1995) 2 Supreme Court Cases 513 (Rama Narang Vs. Ramesh Narang and Others).** The Apex Court held that where Appeal is preferred under

section 374 of the said Code of 1973, the Appeal is against both conviction and sentence and therefore, there is no reason to place narrow interpretation on Section 389(1) of the said Code of 1973 by holding that the said provision does not extend to the order of conviction. Paragraph No.19 of the decision of the Apex Court reads thus:

> 19. **That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case.** The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. **Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no rason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code.**(Emphasis supplied)

A reference will have to be made to another decision of the Apex Court reported in **(2001)6 Supreme Court Cases 584 (K.C.Sareen Vs. CBI, Chandigarh)** in which the Apex Court has relied upon its earlier judgment in

the case of Rama Narang(Supra).Paragraph No.11 of the said decision reads thus:

> 11. The legal position, therefore, is this: **though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance.** It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in the challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter.(Emphasis supplied)

After holding as aforesaid, the Apex Court held that in case of a conviction on a corruption charge against the public servant, the Appellate Court or the Revisional Court should not suspend the order of conviction during the pendency of Appeal even if the sentence of imprisonment is suspended. But the law laid down by the Apex Court is that a power to suspend an order of conviction apart from the order of sentence is not alien to section 389(1) of the said

Code of 1973. The Apex Court has held that such power should be exercised in very exceptional cases and before the power is exercised, the duty of the Court is to look at all aspects including ramifications of keeping the said conviction in abeyance.

5. The learned Additional Sessions Judge referred to the decision of the Apex Court in case reported in **(2001) 7 Supreme Court Cases 231 (B. R. Kapur Vs. State of T.N. and Another)** and held that the order of conviction cannot be suspended under section 389(1) of the said Code of 1973. The relevant portion of the paragraph No.34 of the said decision reads thus:

> 34. It is true that the order of the High Court at Madras on the application of the second repsondent states:"Pending criminal appeals the sentence of imprisonment alone is suspended and the petitioners shall be relased on bail...", but this has to be read in the context of section 389 under which the power was exercised. Under Section 389 an appellate court may order that "the execution of the sentence or order appealed against be suspended...". It is not within the power of the appellate court to suspend the sentence it can only suspend the execution of the sentence pending the disposal of appeal. The suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of a grave offence and has attracted the sentence of imprisonment of not less than two years. The suspension of the execution of the sentences, therefore, does not remove the disqualification against the second respondent.

If the said decision of the Apex Court is read, it is

apparent that the issue regarding the power of the Court to suspend the conviction was not before the Apex Court. The issue which was decided by the Apex Court was whether a person who has been convicted of the criminal offence and his conviction has not been suspended pending an Appeal can be sworn in and can continue to function as Chief Minister of a State. The Apex Court has not really examined the question whether the Appellate Court has power to suspend the conviction. The Apex Court went further and observed that suspension of execution of sentence does not remove the disqualification against the Respondent before it. The Apex Court in a decision reported in (2003) 12 Supreme Court Cases, 434 (Union of India Vs. Atar Singh) held that "It cannot be doubted that Section 389 confers a discretion on the Appellate Court to decide the question of suspension of a conviction in a given case." Thus, it appears to me that the correct position of law on this aspect is one which emerges from the decision of the Apex Court in the cases of K.C.Sareen (Supra) and Atar Singh (Supra) that power to suspend order of conviction does exist but, it is to be exercised in very exceptional cases after considering all the aspects of the matter including the ramifications of keeping the said conviction in abeyance. Thus, view taken by the learned Additional Sessions Judge seems to be incorrect.

6. By the Application in question, the Applicant sought extra-ordinary relief of suspension of conviction. As I have held that there is a power vesting in the Court to suspend order of conviction, the question is whether said power could have been exercised. The Appeal is pending before the learned Additional Sessions Judge. The record of the trial Court is before the learned Additional Sessions Judge. The material on record will have to be examined before the relief as prayed by the Applicant is considered on merits. The ramifications of passing such order will have to be also examined. This exercise will have to be left to the Sessions Court by remanding the matter.

7. Hence, I pass the following order:

: O R D E R :

i) The impugned Judgment and Order dated 13th April, 2005 is quashed and set aside and Application at Exhibit 15 made by the Applicant in Criminal Appeal No.02 of 2005 is restored to file. The learned Additional Sessions Judge will hear and decide the said Application afresh in the light of the observations made in this judgment.

JUDGE